FILE COPY

Supreme Court of the United States

No. 819

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 819

CORY CORPORATION AND MITCHELL MANUFACTURING COMPANY,
Petitioners,

vs.

ERNEST J. SAUBER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

1.

That the Court of Appeals has flouted the direct command of this Court to review a designated finding of fact is not denied. Nor is it contended that the Court of Appeals was authorized to construe the revenue rulings in defiance of the rationale of this Court's decision.

When this Court held the rulings valid, it determined that they embodied a concept of horsepower that had a rational relationship to what was a self-contained or household type air-conditioning unit taxed under the statute. (363 U.S. 711-712.) The government does not pretend

that nominal horsepower (as distinguished from rated or actual horsepower) has any engineering or physical relationship to the statutory definition of a taxable air conditioner.[1] On the contrary, the government has stipulated as a fact that nominal horsepower is no more than an arbitrary label assigned at the caprice of private motor manufacturers without reference to any rational or consistent standard. (R. 50-51.) Nominal horsepower, therefore, cannot be a relevant criterion of taxability under this Court's opinion.

Although the government says that "engineering usage is but one of numerous relevant considerations" (Resp. Br. 6, fn. 3), this statement is made without citation to the record[2] or to any authority, and without specifying any of these "numerous" considerations. The government does not attempt to explain how any consideration unrelated to any physical, engineering or objective standard can be "relevant" under the taxing statute. (See 363 U.S. 711-712.)

---

[1] The government's interpolation, "rated [i.e., nominal]" (Resp. Br. 6), is misleading. The distinction between unstandardized nominal horsepower and "rated" horsepower under trade association standards is clear on this record. (363 U.S. 710; see Pet. 7). Unlike nominal horsepower, "rated" horsepower (not mentioned in the brief in opposition) would be a permissable standard of taxability under this Court's opinion.

[2] Similarly, the statement that "if nominal horsepower were not the test, one of the two units involved in this litigation, indisputably a self-contained unit, would not be subject to the tax" (Resp. Br. 7, fn. 4.) is without any basis in the record. There is no distinction between the two units; the government has stipulated as a fact that they are similar (R. 40-49). Moreover, whether they are self-contained units subject to tax under the statute is the ultimate question in this case; that question, far from being "indisputable", has always been and still is in dispute, and turns on the units' horsepower as defined in accordance with this Court's opinion.

The significance of the decision below is not that it has misconstrued a ruling, but that it has disregarded this Court's mandate, has invoked the authority of this Court to justify an arbitrary and capricious measure of taxation, and has interpreted this Court's decision as upholding the right of the Commissioner of Internal Revenue to delegate the taxing power of the United States to the uncontrolled discretion of private parties.

2.

The brief in opposition makes no attempt to justify the gratuitous invalidation by the court below of the parties' stipulation. It does not challenge our contention that the decision of the Court of Appeals directly conflicts with decisions of this Court and a decision of another circuit, nor does it deny the importance of the question of whether the government may validly stipulate to abide the result of a pending tax case.

All that the government says is that petitioners should not complain because the action of the Court of Appeals "favors" them. While the importance of the decision is not affected by who is favored or disfavored, it is clear that the Court of Appeals has conferred no favor upon either party.

The stipulation to abide by the results of the instant case was entered into because neither the government nor petitioners desired to relitigate the same issue of taxability in tens of thousands of separate proceedings. If petitioners prevail in this case, the stipulation precludes the government from collecting other assessments that have been adjudicated to be illegal. For this assurance, petitioners have agreed to accede to the collection of taxes on the other units if this case goes against them, and they are quite willing to forego the dubious privile

granted by the Court of Appeals of bringing innumerable refund suits to relitigate the identical issue.

There is no issue other than taxability. The government's discussion of estoppel under Section 1108(b) of the 1926 Act (Resp. Br. 8-10) is beside the point. There has never been any estoppel issue as to the two units in this case, and it was only while the validity of the rulings was still in doubt that there was any question of future relief under Section 1108(b) as to the similar units. That question disappeared when this Court held the rulings valid. The only remaining issue, now or in the future, is whether the rulings impose a tax. Section 1108(b) affords no relief to a taxpayer, irrespective of his reliance or non-reliance, if his sales are taxable under a valid ruling. Conversely, neither Section 1108(b) nor any other law permits the government to collect illegal assessments on sales which a valid ruling exempts from tax.[3]

Respectfully submitted,

EDWIN A. ROTHSCHILD,
SIDNEY M. PERLSTADT,
77 West Washington Street,
Chicago 2, Illinois,

STANFORD CLINTON,
111 West Monroe Street,
Chicago, Illinois,
Attorneys for Petitioners.

---

[3] If a taxpayer has collected a tax on any such sale from a vendee, the liability of the taxpayer is, of course, to the vendee, not to the government, and the issue is to be determined under principles of unjust enrichment, not under Section 1108(b). As we stated in our petition, we are fully prepared to submit complete evidence on this issue in any trial that may be ordered.